Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Thomas A. Norris

Petitioners

v.

Gimmel, Weiman, Savitz, Kronthal, P.A. and Gerald K. Gimmel

Respondents

On Petition for Writ of Certiorari
To the Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

Thomas A. Norris
P. O. Box 317
Ashton, MD 20861
(301) 439-1066

67 pp

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented to this Honorable Court for review:

1. Is the Due Process Clause of the Fourteenth Amendment violated if a judicial appointee (i.e., current Chairman of the Attorney Grievance Commission appointed by the Maryland Court of Appeals) is allowed to testify as an Expert Witness on behalf of a Defendant attorney in a legal malpractice suit?

2. Is the Due Process Clause of the Fourteenth Amendment violated if a Trial Court gives preferential treatment to lawyers in legal malpractice cases by refusing to give Plaintiff's requested jury instruction concerning missing evidence?

PARTIES TO THE PROCEEDING

Petitioners:	Thomas A. Norris and P. O. Box 317 Ashton, MD 20861 (301) 439-1066
Attorney for Petitioners:	N/A--*pro se*
Respondents:	Gimmel, Weiman, Savitz, & Kronthal, P.A. and Gerald K. Gimmel
Attorney for Respondents:	S. Todd Wilson, Esq. Eccleston & Wolf 7th Floor, Scarlett Place 729 E. Pratt Street Baltimore, MD 21202

CORPORATE DISCLOSURE

The Petitioner has no knowledge of any parent company or subsidiary.

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TABLE OF CITED AUTHORITIES

CASES:

Aetna Life Insurance Co. v. Lavoie et al., 475 U.S. 813; 106 S.Ct. 1580 (1986).

Beahm v. Shortall, 279 Md. 321, 339 (1977).

Blum v. Morgan Guaranty Trust Co. CA11 GA, 709 F.2d 1463 (1983).

DiLeo v. Nugent, 88 Md.App. 59, 592 A.2d 1126 (1991)

K&K Mgt. Inc. v. Lee, 316 Md. 137, 557 A.2d 965 (1989).

Kennelly v. Burgess, 337 Md. 562, 654 A.2d 1335 (1995).

Lawless v. Merrick, 227 Md. 65, 175 A.2d 27 (1961).

Meyerberg, Sawyer and Rue v. Agee, 51 Md. App. 711 (1982),

Murchison, 349 U.S., 133, 136.

Sukoff v. Lemkin, 202 Cal.App.3d 740, 249 Cal.Reptr. 42 (1988)

Wartzman v. Hightower Productions Ltd., 53 Md. App. 664 (1982).

Whittaker Corp. v. Edgar, 535 F.Supp. 933 (N.D. Ill. 1982).

STATUTES AND REGULATIONS:

28 U.S.C. § 1254(1)

42 U.S.C.

RULES CITED:

Maryland Rule 1232, Canon 2, Code for Conduct of Judicial Appointees,

13 Fed Rules of Evidence Serv 1010.

Rule 702 Federal Rules of Evidence

IN THE

SUPREME COURT OF THE UNITED STATES

Thomas A. Norris et. al.
v.
Gimmel, Weiman, Savitz, Kronthal et. al.

The Petitioner, Thomas A. Norris respectfully petitions this Honorable Court for a writ of certiorari to review the order of the Court of Appeals of Maryland who denied the petition for a writ of certiorari in this case.

OPINIONS OF COURTS BELOW

1. The Petitioner filed a Complaint in April, 1990, by and through its attorney, David G. Whitworth, Jr., Esquire, against the Respondents Gimmel, Weiman, Savitz, and Kronthal, P.A. and Gerald K. Gimmel, Esquire for professional malpractice seeking compensation for various economic losses suffered by Petitioner (Civil Case #58478 in the Circuit Court of Montgomery County, Maryland).

2. The Respondents filed a Motion to Dismiss in which they claimed, among other things, that the professional legal malpractice action could not be brought against them since the Respondents never represented either Thomas A. Norris
The Defendant's Motion to Dismiss was denied on July 12, 1991 by the Honorable Judge Vincent E. Ferretti, Jr. Consistent with the Defendant's Motion to Dismiss, Respondent Gerald K. Gimmel's Answers to Interrogatories dated November, 1991, denied that he was counsel for either Thomas A. Norris or Heritage Development Corporation.

3. The Petitioner filed a Motion to Compel discovery against the Respondents on June 19, 1992, and on July 17, the Respondents filed a Motion for Summary Judgment. A hearing was held on July 2, 1993 on the Respondent's Motion for Summary Judgment before Judge Ferretti. Respondent did not file any affidavit or other

evidence in support of the Motion. The Motion for Summary Judgment was denied as to Thomas A. Norris, but granted as to Heritage Development Corporation because the Judge ruled that there was no proximate cause.

4. The hearing on the merits of the case for Thomas A. Norris was held in July 11, 1994 in the Circuit Court of Montgomery County, Maryland, before a jury with Judge Ferretti presiding. The jury rendered a decision in favor of the Respondents (Appellees) on July 22, 1994. The Petitioner then filed a Motion for New Trial, which was denied.

5. The Petitioner (Appellant), through its attorney, Mr. Jay L. Cohen, Esquire, timely appealed to the Court of Special Appeals on October 11, 1994 (No. 1859, September Term 1994, Court of Special Appeals of Maryland). On January 24, 1996 the Court of Special Appeals issued a mandate which affirmed, with one dissenting opinion, the decision of the lower court. The Unpublished Opinion is shown in Appendix B.

6. The Petitioner then timely appealed to the Court of Appeals on February 8, 1996 (Petition Docket No. 698, September Term, 1995). On May 8, 1996, the Court of Appeals issued an Order denying the issuance of a writ of certiorari (see Appendix A).

7. The Petitioner is now timely filing this Petition, under this Honorable Court's Rule 11.

JURISDICTION

The Judgment of the Maryland Court of Appeals was entered by an order issued on May 8, 1996. This Petition for Writ of Certiorari is timely filed within ninety days of the Order. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves professional malpractice by an attorney (Gerald K. Gimmel, Esquire and Gimmel, Weiman, Savitz, and Kronthal, P.A.) during his joint representation of three (perhaps four) clients. Mr. Gimmel represented Thomas A. Norris, personally, Party Time Discount Beer & Wine, Inc. (a corporation established, operated, and controlled by Thomas A. Norris), and Heritage Development Corporation (a corporation wholly owned by Thomas A. Norris). Mr. Gimmel also testified in trial that he represented another shareholder, Tommy (no middle initial) Norris, no relation to Mr. Norris.

Due to the numerous "Thomases" and "Norrises" in this case, the following abbreviations will be used: Thomas A. Norris, the Petitioner, will be referred to as "Mr. Norris"; the passive investor, Thomas R. Fowler will be referred to as "Fowler"; Mr. Norris' business partner, Thomas (no middle initial) Norris, no relation to Mr. Norris, will be referred to as "Tommy Norris"; and Mr. Norris' father, Thomas E. Norris, will be referred to as "T.E. Norris."

Mr. Gimmel and his law firm began representing Mr. Norris in 1981. Initially, they represented him in a domestic-relations matter. In 1982, Mr. Norris and Gary Balsamo incorporated a business that became Party Time Discount Beer & Wine, Inc. ("Party Time"). Later, Tommy Norris joined Party Time and each held one-third of the outstanding stock in the corporation. The beer and wine store was located in Wheaton, Maryland.

In 1983, Gary Balsamo attempted to take full control of the corporation by issuing Party Time stock to himself. The Gimmel firm litigated on behalf of Mr. Norris and Party Time and as a result, the corporation bought out Balsamo's stock. Mr. Norris and Tommy Norris became equal 50% co-owners of Party Time, with Mr. Norris serving as President and Treasurer, and Tommy Norris serving as Vice President and Secretary. Respondent Gimmel became Party Time's corporate counsel. In 1984, Mr. Norris founded Heritage Development Corporation ("Heritage"), a construction company. Gimmel represented Mr. Norris personally in the formation of that company and became its resident agent and general counsel. Gimmel continued to

perform various legal services for Mr. Norris personally as well as Heritage and Party Time. Mr. Norris, who was a young man at the time with no formal business or legal training, relied on Mr. Gimmel and his firm for advice and legal protection.

In 1985, Mr. Norris developed a plan to expand Party Time by opening a second location in Prince George's County. He found a suitable site and arranged for a $580,000 Small Business Administration loan from First Women's Bank ("FWB") in Rockville, Maryland. SBA would not authorize the loan unless Mr. Norris raised about $200,000 additional capital; therefore, Party Time ran an ad for investors. Thomas Fowler responded and ultimately agreed to purchase one-third of the stock of Party Time.

By November 21, 1985, Mr. Norris and Tommy Norris had reached an understanding that they would bring Mr. Fowler aboard as a "passive" investor. Mr. Norris had private conversations with Gimmel whereby Mr. Norris made it clear to Gimmel that he must retain control of Party Time. Subsequently, at Gimmel's request, Mr. Norris sent a letter to Gimmel on December 3, 1985, outlining some of the terms of his and Tommy Norris' agreement with Mr. Fowler. The Shareholders' Agreement was to incorporate the points made in this letter. Mr. Gimmel drafted the Shareholders' Agreement. One of the provisions, as evidenced in the December 3rd letter, was that Mr. Norris, Tommy Norris, and Fowler would each be paid $45,000 annually and that a "unanimous vote of all the shareholders will be required to raise these salaries." Moreover, Mr. Norris was to remain President, and Tommy, Vice President. The following details the dispute between the parties.

Mr. Norris' Testimony

Mr. Norris testified that he sought Mr. Gimmel's advice on how to bring in Fowler without losing control of the corporation. He wanted to avoid a repeat of the problems with Gary Balsamo in 1983 when Balsamo tried to oust Mr. Norris from Party Time. As matters stood on December 3, 1985, Mr. Norris could not be outvoted because he and Tommy Norris each had 50% of the vote. Mr. Norris expressed his wish to remain as President and in control of the corporation and told Mr. Gimmel that if he

could not retain control, no stock would be issued to Fowler. Gimmel told Mr. Norris that a Shareholders' Agreement could accommodate his wishes for control. Gimmel also told him that a unanimity provision for the increase of salary, as outlined in the December 3, 1985 letter, was not required because *unanimous* agreement would be needed to change any item contained in the Shareholders' Agreement. Finally, Mr. Norris understood from Gimmel that the Shareholders' Agreement protected his right to remain president of the corporation for an unlimited duration, absent cause.

Mr. Gimmel's Testimony

Gimmel testified that, although Mr. Norris expressed his desire to remain in control of the corporation and its president, he (Mr. Norris) indicated that he thought that he would be able to accomplish this through an alliance (based on his friendship) with Tommy Norris. Gimmel claimed that the Shareholder' Agreement could be changed at any time by a majority vote of the shareholders. Gimmel claimed that Mr. Norris did not want to make any changes to the corporation that would "scare" Fowler from investing. He claimed that the Shareholders' Agreement was drawn up primarily to restrict Fowler's ability to transfer his Party Time stock to a third party. In addition, Gimmel claimed that the unanimity requirement regarding the increase in salary was taken out of the first draft of the Shareholders' Agreement with Mr. Norris' express consent so that Fowler could not veto Mr. Norris' and Tommy Norris' ability to raise their salaries.

Although Gimmel testified at trial that he always believed a Shareholders' Agreement could not make someone "president for life," his testimony at trial was contradicted by his deposition of March 11, 1994, where he said he believed at the time he drafted the Shareholders' Agreement that, unless there was unanimous consent among the shareholders, Mr. Norris would remain President in perpetuity:

> "Q: ...It was also your testimony that a majority of the board of directors could in fact change it [shareholders agreement].

A: Well, if I said that, I take it back. I do not believe that.

Q: You do not believe that?
A: I do not believe.

Q: Do you believe that a majority of the shareholders could in fact change this agreement?
A: No.

Q: Why not?
A: Because it is an agreement or contract between a number of parties and I don't think that any one party or group of parties can change it without all the parties agreeing to the changes.

Q: And what do you believe is the duration of the requirements of the contract as it imposes restrictions on any of the parties?
A: I think this agreement is in effect until it is changed.

Q: Okay. Did you so advise the respective shareholders who entered into this agreement in 1985?
A: I don't remember precisely what we said.

Q: Did you advise them that it would not be changed except by their unanimous consent?
A: As I said, I don't remember what I said.

* * *

Q: "Okay. At the time you drafted this agreement, did you believe that unless there was unanimous consent that Thomas A. Norris would remain as President in perpetuity.
A: Absent some circumstances occurring, yes.

Q: Okay. And what other circumstances would change that right?
A: Well, he could die, he could be disabled, he could resign, he could leave the corporation and voluntarily give up the position...."

This testimony was both read into the record at the beginning of the trial and presented to Mr. Gimmel during cross-examination.[1] Mr. Gimmel testified that he advised Mr. Norris, Tommy Norris, and Fowler when they signed the Shareholders' Agreement that it constituted an enforceable contract against each of them. It should be noted that neither Tom Fowler nor Tommy Norris were represented by counsel. Although Mr. Gimmel was obviously in a conflict of interest, he testified that at no time during this period did he advise Mr. Norris to seek independent counsel in order to protect his interests in this matter.

At trial, Mr. Gimmel testified that the corporate by-laws prevented anyone from contracting to be president for life, but he admitted that he never advised Mr. Norris of this alleged theory, nor did he research this matter, nor did Mr. Gimmel discuss the articles or the by-laws at any time with Mr. Norris when they met to draw up the Shareholders' Agreement or any time thereafter.

Tommy Norris' Testimony

Tommy Norris testified that he believed the Shareholders' Agreement only preserved Mr. Norris' control of the corporation if he voted with Mr. Norris. Although Mr. Gimmel had testified that he also represented Tommy Norris personally, Tommy Norris denied any such representation. In addition, Tommy Norris further refuted Mr. Gimmel's explanation regarding the December 3rd letter and the raising of salaries. Although Mr. Gimmel claimed that increases to the salaries could be done by

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[1] It should be noted for the record that following the trial of July, 1994, Mr. Gimmel replied in writing to the Attorney Grievance Commission regarding his involvement with his representation of Mr. Norris and the drafting of the Shareholders' Agreement. In that written reply, Mr. Gimmel again contradicted his sworn trial testimony and stated, among other things, that the Shareholders' Agreement that he drafted on behalf of Mr. Norris was meant to be changed only by unanimous consent of the parties involved. (Letter from Gimmel to Mr. Robert Conrad, Attorney Grievance Commission of MD, File No. 95-0-1604, August 10, 1995, p. 3).

majority vote, Tommy Norris, in trial, stated that these salaries could only be changed with unanimity:

> **Q**: "Did you have an understanding one way or another as to whether your salary might increase or decrease as set forth in this document, sir?"
> **A**: "It would increase, but everyone had to agree on it."

Mr. Fowler's Testimony

Although Tom Fowler could not "recall anything" that Gimmel advised him regarding the Shareholders' Agreement, he gave testimony supportive of Gimmel to wit: that he invested money based on becoming a full one-third owner, that he would not have agreed to allow Mr. Norris to control Party Time's day-to-day operations, and that the majority could control the corporation. However, Tom Fowler, like Tommy Norris, contradicted Mr. Gimmel's key testimony relating to the salary issue by testifying that he believed the Shareholders' Agreement was meant to give him a perpetual "salary for life" absent a unanimous decision to the contrary.

Additional Facts

Mr. Norris and Tommy Norris, both in their capacity as officers of Party Time and individually, along with Thomas Fowler signed the Shareholders' Agreement on December 12, 1985 in Mr. Gimmel's office. Once the stock transfer to Fowler was completed, Party Time continued with its plan to open a restaurant and package store in Prince George's ("P.G.") County, Maryland. Mr. Norris retained counsel in P.G. County to assist in obtaining a liquor license because Gimmel was unfamiliar with the process. When Party Time learned that in order to get a Prince George's County liquor license, it was necessary to have a resident of P.G. County own at least 25 percent of the corporation, Mr. Norris discussed with Gimmel the transferring of 25% of the outstanding Party Time stock to his father, T.E. Norris, a P.G. County resident. Mr. Norris told Gimmel that he would only transfer stock to his father if there was some protection such as an agreement or "some sort" of an irrevocable buy-back provision that he could exercise if something went wrong.

Mr. Norris wrote to Gimmel on January 2, 1986, requesting that Gimmel draw up the necessary papers.

Here, again, the testimony as to what happened differs. Mr. Norris testified that he assumed that such an irrevocable buy-back agreement had been drawn up and it is undisputed that he had been billed for such by Gimmel. Gimmel's bill stated "Prepared agreement between Thomas A. and Thomas E. Norris for sale of stock." Therefore, Mr. Norris went forward with the transfer of 70 of his personal shares to his father, leaving him with only 8% of the outstanding stock in Party Time. Gimmel testified that Mr. Norris called him and instructed him to stop any further efforts with respect to the buy-back agreement because Prince George's County did not allow such agreements with the resident stockholder. Gimmel also testified that he "personally made sure the agreement was never completed." Mr. Norris' Party Time stock was transferred by Gimmel to T.E. Norris for no consideration on January 11, 1986. In an Opinion Letter to FWB and SBA dated October, 1986, Gimmel failed to disclose this transfer to FWB or the SBA as required.

In August 1986, FWB insisted that Mr. Norris' wholly-owned construction company, Heritage, be added as a guarantor on the $580,000 SBA loan. Mr. Norris discussed this development with Gimmel and was advised by Gimmel to go ahead and allow Heritage to become a guarantor.

In the early part of 1987, Fowler and Tommy Norris were plotting to take over Party Time. Although Gimmel testified that he knew such a plot by Tommy Norris and Fowler was in the process, Gimmel did not warn Mr. Norris or advise him that he should seek independent counsel in order to protect his interest. Without Mr. Norris' knowledge, Tommy Norris and Fowler visited Gimmel at his office on April 30, 1987. They stated that they wished to hold a Party Time shareholders' meeting on May 6 to discuss the takeover of Heritage and the allocation of funds between Party Time and Heritage. Without contacting Mr. Norris, Gimmel agreed to hold the meeting at his office.

Upon Gimmel's recommendation, Tommy Norris and Fowler also agreed to discuss the Party Time corporate situation with Edward Quinn, an outside financial consultant

that was a personal acquaintance of Mr. Gimmel. Mr. Norris was notified of this meeting by Tommy Norris, in writing, on the same day. After notification, Mr. Norris then called Gimmel to find out what was going on. Gimmel explained that Tommy Norris and Fowler had visited his office to set up a meeting and that he had spoken with them about retaining Mr. Quinn. Later that same day, Mr. Norris sent a memo to Fowler, Tommy Norris, and Gimmel requesting that two items be added to the agenda of the May 6 meeting: changing Party Time's officers and buying Tommy Norris out of the corporation.

On Friday, May 1, 1987, Fowler and Tommy Norris illegally removed Mr. Norris' name from the corporate bank accounts and locked Mr. Norris out of the Party Time store. Mr. Norris called Gimmel on Monday, May 4, to advise him of these nefarious actions. Gimmel advised Mr. Norris to do nothing until the shareholders' meeting so that he might personally help resolve the shareholders' differences. At no time did Gimmel advise Mr. Norris to secure independent counsel in order to protect his interest.

The shareholders' meeting was held on May 6, 1987, in Gimmel's office. Fowler moved to have Mr. Norris removed as president of Party Time. The minutes as recorded by Gimmel reflect that the following then occurred:

> "Mr. Thomas (NMI) Norris seconded the motion. Mr. Thomas A. Norris stated that he believed that this was illegal under the shareholders' agreement. The parties asked of counsel and counsel advised that the shareholders' agreement had been approved by each shareholder and the Board of Directors of the corporation."

Fowler voted in favor of the motion, Mr. Norris voted in opposition, and Tommy Norris abstained. At no time during this period did Gimmel advise Mr. Norris that he should secure independent counsel in order to protect his interests or the interests of Heritage.

In an effort to protect the substantial assets of Party Time and Heritage as well as to limit his own personal liability, Mr. Norris, on May 11, contacted Gimmel and

requested that he draw up any papers necessary to dissolve the corporation, unless the stockholders could work out "an expeditious and a mutually agreeable stock buy-out." It was at this time that Mr. Norris learned from Gimmel that there was no buy-back provision in effect in order for him to regain his stock from T.E. Norris. The next day, Gimmel sent a letter to all four stockholders advising them that he could no longer represent any of them or Party Time. A number of months later, Gimmel resigned as counsel from Mr. Norris' company, Heritage Development Corporation.

Fowler and Tommy Norris held a shareholders' meeting on May 19, 1987, at which time they proceeded to remove Mr. Norris as President of Party Time. Mr. Norris secured new counsel and brought suit against Fowler, Tommy Norris, et al in order to enforce the Shareholders' Agreement. Meanwhile, Fowler and Tommy Norris remained in control of Party Time and proceeded to destroy the company until November, 1987 when Party Time filed for bankruptcy. The Bankruptcy Court granted Mr. Norris' Motion to remove Fowler and Tommy Norris as trustees of Party Time due to their "gross mismanagement," failure to pay payroll taxes, retail sales taxes, etc.

As a result of losing control of Party Time, Mr. Norris lost his salary and benefits, all of his Party Time stock, and was faced with numerous judgments resulting from his personal guarantees on behalf of Party Time. Mr. Norris incurred hundreds of thousands of dollars in personal liability, including judgments from the IRS, his credit was ruined, and he was financially destroyed. In addition, Mr. Norris' mother lost all of her monies that were placed into Party Time. Additionally, Party Time defaulted on the FWB loan and Mr. Norris' company, Heritage, as guarantor, was forced to file for bankruptcy in June, 1988 and all of its assets were liquidated. Heritage was forced to pay approximately $100,000 in cash to First Women's Bank on behalf of Party Time as a result of its guarantee. Neither Fowler nor Tommy Norris paid any personal funds to FWB.

REASONS FOR GRANTING THE PETITION

Today, the judicial system is experiencing a crisis of public confidence that is unprecedented in U.S. history. While such an analysis may be alarming, it is nonetheless a self-evident fact. So severe is this problem that one analyst recently wrote[2] that lawyers have replaced ethics for mere commercialism and, as a result, have injected a malaise of cynicism throughout our land. The article further stated:

> "... Slick and brass-knuckled lawyering feeds the characteristic that most seriously threatens our cohesiveness as a nation and civil society: **loss of trust in one another and in our institutions** *(emphasis added).*
>
> Citizens who do not trust one another, individuals who do not trust their institutions and institutions that don't trust individuals they serve and employ--these are the acidic ingredients of a society losing faith in itself."

One reason for the credibility problem of the justice system is the public's perception--rightly or wrongly--that the system is neither fair nor just. Many think justice goes to the highest paid lawyer who then manipulates the system for his own pecuniary interest. While there is certainly some truth to such perceptions, the judicial system has been deliberately designed in such a manner as to find truth and deliver justice. However, in this adversarial atmosphere, the truth can only be discovered if the playing field is level. Should one side gain the advantage through less-than-fair-tactics and manipulation of the process, then the legal system and its product of justice will be perceived by the public as of little worth or value. Today, the High Court cannot afford to miss any opportunity that will offer the chance to strengthen the public's waning confidence in the legal system.

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[2]Article written by Joseph A. Califano, Jr., former secretary of Health, Education, and Welfare and a Washington and New York lawyer, "The Law: Once a Noble Profession," *The Washington Post*, January 28, 1996.

Considering the public's lack of confidence in the legal system, it is curious indeed that the Maryland Court of Appeals would not take this opportunity to demonstrate to the public that they are interested in ensuring that the legal system is fair and just. Moreover, considering the fact that this is the very court that appointed the Attorney Grievance Commissioner and that they are ultimately responsible for his conduct, one would think that the Highest in the State of Maryland would be anxious to address their responsibility in this matter and resolve the obvious conflict of interest as well as the strong perception of prejudice on behalf of lawyers that this case raises. Their conclusion that this case is not relevant to the public's interest speaks volumes about how the legal system operates. Surely the public would like to see the court make certain that lawyers do not manipulate the system for their own ends. Perhaps this court was not desirous that the public even know that its own appointed Commissioner of the Attorney Grievance Commission is using his good office for private profiteering by defending lawyers in private malpractice cases. For the Maryland Court of Appeals to ignore this outrageously prejudicial situation, especially in light of the strong dissenting voice of the Honorable Judge Bishop of the Maryland Court of Special Appeals, seems myopic at best and self-serving at worst.

Notwithstanding the Maryland court's indifference, this case allows this Honorable Court to publicly declare that Defendant lawyers in malpractice cases should not be able to take advantage of the system by using judicially-appointed Commissioners to testify on their behalf as expert witnesses. Such expert testimony is highly prejudicial and calculated to give an unfair advantage to the Defendant lawyer. If the courts allow this unfair situation to stand, they would in fact be sanctioning the special treatment of lawyers. Moreover, this case will allow the court to make certain that lawyers should be held to a higher standard of conduct as it relates to spoliation because of their fiduciary relationship to the public.

While it is axiomatic that lawyers--like any citizens--are entitled to a fair trial under the Due Process Clause of the Constitution, they should not even in the slightest degree be given preferential treatment by the courts. Such special treatment not only gives the appearance of impropriety and

lessens the public's confidence in the legal system but deprives the Plaintiff in a legal malpractice case of his or her rights of due process as set forth by the U.S. Constitution. The questions at issue are as follows.

1. **Is the Due Process Clause of the Fourteenth Amendment violated if a judicial appointee (i.e., current Chairman of the Attorney Grievance Commission appointed by the Maryland Court of Appeals) is allowed to testify as an Expert Witness on behalf of a Defendant attorney in a legal malpractice case?**

The Respondent's (Appellee's) expert witness, James Cromwell, began his testimony by reviewing for the jury his background that qualified him to be an expert witness. However, before Mr. Cromwell went on to describe his lengthy background and impressive qualifications, he revealed to the jury his position with the Maryland Bar Association Committee on Lawyers Professional Conduct. Petitioner's counsel objected but was overruled. Mr. Cromwell then went on to recite his various judicial appointments and associations[3] including his **current position** as Chairman of the Attorney Grievance Commission for the State of Maryland, which, as he stated in his testimony, is a position appointed by the Maryland Court of Appeals.

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[3]Mr. Cromwell testified about his past position as Chairman of the *Maryland Appellate Judicial Nominating Commission* which seeks out and recommends to the Governor candidates for the Court of Appeals and Court of Special Appeals; his involvement with the *Maryland Code Commission*; his membership in *The American Law Institute*; his membership on the *Board of Governors in the Maryland State Bar*, his gubernatorial appointment on the *Commission for Law Enforcement and the Administration of Justice*, and his involvement with the *Committee on Lawyers Professional Conduct*. In addition, Mr. Cromwell stated that he was a member of the *Committee on Professional Conduct*, the *Section Council on Legal Education and Admission to the Bar*, the *American College of Trial Lawyers*, and the *American College of Estate and Trust Counsel*, etc.

Against the repeated objections of Petitioner's counsel, the Trial Judge allowed Mr. Cromwell to parade his many judicial and quasi-judicial appointments as well as the fact that he was the current chairman of the Attorney Grievance Commission, including details of the duties and responsibilities of the Commission. Mr. Cromwell testified on direct:

> Q: "Sir, have you been appointed by the Court of Appeals in the State of Maryland for any positions?
>
> A: I have been.
>
> Q: What have they appointed you, sir?
>
> A: I am currently the Chairman of the Attorney Grievance Commission in Maryland. That is a 10 member commission that oversees the subject matter of lawyer discipline and lawyer conduct and is responsible for the disciplining of lawyers incompetence and incapacity of lawyers. It covers a variety of subjects."

Petitioner's counsel objected by stating to the Trial Judge that Mr. Cromwell's testimony "makes it sound like he is operating in a quasi-judicial capacity, Your Honor, and I think that [it] is misleading to the jury and it adds an unfair bias to this witness...."

In addition, Petitioner's counsel reminded the Trial Judge that the Respondent's motion in limine had been granted and the Code of Professional Conduct and ethical violations were not to have even been mentioned. The Trial Judge overruled the objection. Petitioner's counsel then requested that an advisory instruction be given to the jury, but the Trial Judge refused. Mr. Cromwell was then allowed to further parade his many judicial and quasi-judicial appointments to the jury. He not only mentioned these positions by name but described each in detail, listing the responsibilities, functions, and duties of these judicial and quasi-judicial associations.

Mr. Cromwell's testimony regarding his various judicial appointments was highly prejudicial as shown below:

1. **Gives the jury the impression that it was an official testimony of the Court**. Mr. Cromwell's highly prejudicial testimony could give the jury the impression that his testimony was an official testimony of the Court. Mr. Cromwell deliberately pointed out to the jury that the Chairman of the Attorney Grievance Commission is appointed by the Maryland Court of Appeals.

Mr. Cromwell's judicial and quasi-judicial appointments should have been "unrevealed" to the jury so that no inference could be drawn by the jury that his testimony in this civil case has been in any way approved or sanctioned by the judicial system. See *K&K Mgt. Inc. v. Lee*, 316 Md. 137, 557 A.2d 965 (1989). In that case, although the judge was allowed to testify as an expert witness, the trial court directed all parties ***and witnesses that the jury not be made aware*** of the judge's public office. This order was scrupulously followed.

2. **Confusing to the jury**. Mr. Cromwell's statements regarding his judicial appointments and associations were confusing to the jury. In this case, the Petitioner was barred from even mentioning the Rules of Professional Responsibility (because of the motion in limine granted by the Trial Judge) and from arguing that the Respondent's actions violated professional ethics. Against this backdrop, however, the Respondent was permitted to have his expert witness testify of his special credentials relevant to professional ethics and legal conduct. Mr. Cromwell was even permitted to tell the jury that at one time he served as "Chairman of the Maryland Appellate Judicial Nominating Commission." Such testimony appears to give an official stamp of approval on Gimmel's behavior while at the same time denying the Petitioner any ability to cross examine relative to ethical grounds

3. **Unnecessary to qualify him as an expert witness**. The majority opinion of the Court of Special Appeals erred when they stated that the "Appellees were merely attempting to qualify Mr. Cromwell as an expert witness." Such an interpretation by the Court does not fit the facts. The additional information relating to Mr.

Cromwell's judicially-appointed positions was highly prejudicial and totally unnecessary in order to qualify him as an expert witness. The jury did not need to hear that Mr. Cromwell was the ***current*** Chairman of the Attorney Grievance Commission nor did they need to hear in detail the responsibilities of this Commission. In addition, the jury did not need to hear that Mr. Cromwell was a member of the Committee on Lawyers Professional Conduct. Certainly, Mr. Cromwell's expertise on standard of care was not derived from his experience as Chairman of the Attorney Grievance Commission. Rule 702 of the Federal Rules of Evidence permits qualified experts to testify about their specialized knowledge only when the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue.

Mr. Cromwell's emphasis on his judicial and quasi-judicial associations was far in excess of what is required to "demonstrate a minimal amount of competence" or "expertise" necessary in order to be qualified as an expert witness [*Beahm v. Shortall*, 279 Md. 321, 339 (1977)]. It is obvious that Mr. Cromwell's testimony went far beyond the minimal amount of competence or expertise that is required of an expert witness in order to deliberately gain an unfair advantage in trial.

4. **Undue Influence**. Some opponents of expert legal testimony are concerned that experts may exert undue influence or that trials--especially in legal malpractice cases--may be reduced to battles of experts on the applicable law. For several reasons, an expert acquires an aura of authority and impartiality when he ascends the witness stand. The courts must be particularly careful in allowing counsel to parade the expert's impressive list of credentials because jurors may be more impressed by an expert's credentials. See *Whittaker Corp. v. Edgar*, 535 F.Supp. 933 (N.D. Ill. 1982). This was the situation in this case.

It is axiomatic that the jury of layman would give great weight to Mr. Cromwell's testimony. This is underscored by the fact that Respondent Gimmel's trial testimony directly contradicted his earlier depositions in key areas as well as the fact that the Respondent's two key witnesses, Fowler and Tommy Norris, also gave contradictory testimony in areas directly related to Gimmel's testimony. Since contradictory testimony was given by all

of the Respondent's key witnesses, such a situation would lead the jury to place great weight upon Mr. Cromwell's expert testimony.

The Court of Special Appeals' majority opinion stated that it was "unlikely in the extreme" that the jury would have drawn any conclusions linking the standard of care issues of this case with Cromwell's judicially-appointed work in dealing with the Code of Professional Responsibility. Such reasoning not only defies logic but imputes a specialized knowledge to the jury that they do not possess. What layman would even know or understand the difference between these two overlapping areas of legal discipline?

5. Unfair Advantage. If this Honorable Court allows the Chairman of the Attorney Grievance Commission to testify as an expert witness on behalf of a Defendant attorney in a legal malpractice case (and his judicial position is revealed to the jury), then the Plaintiff is automatically placed at a great and unfair disadvantage that can only result in lessening the public's confidence in the judicial system.

The fact that Mr. Cromwell is appointed by the highest court in the State to deal with attorney discipline has a powerful and prejudicial effect on any layman. Moreover, when this judicially-appointed expert on lawyer discipline instructs the jury that Respondent Gimmel did not violate the standard of care as charged and that he did no wrong as alleged, such incredibly prejudicial testimony must have a telling and significant effect on the jury. Mr. Cromwell's judicial positions imputed to him additional credibility that was not afforded to any other witness in this case. It should be obvious that such testimony in a legal malpractice case is designed to gain an unfair advantage for the Respondent.

6. Appearance of Impropriety. According to Maryland Rule 1232, Canon 2, Code for Conduct of Judicial Appointees, a judicial appointee should behave with propriety and should avoid even the ***slightest*** appearance of impropriety. In addition, the "judicial appointee should not use the prestige of the position to advance the private interests of others; nor should a judicial appointee convey or permit others to convey the impression that they are in a special position to influence official conduct." The rule further states that a judicial appointee should not "testify voluntarily as a

character witness" because this testimony injects "the prestige of the appointment into the proceeding in which a judicial appointee testifies and may be misunderstood to be an official testimonial."

Because Mr. Cromwell revealed his highly visible and powerful position to the jury, it is reasonable that the jury could infer from his testimony that Respondent Gimmel's character, as well as his actions, exemplified the ideal image of an upstanding, honest attorney. After all, who would be in a better position to judge the conduct of an attorney than the current Chairman of the Attorney Grievance Commission, appointed by the Maryland Court of Appeals, and who was also a member of the Maryland State Bar's Committee on Lawyers Professional Conduct? Under such blatantly prejudicial circumstances, how can a jury of simple laymen hope to reach a just and equitable verdict?

The majority opinion of the Court of Special Appeals declared that even though Mr. Cromwell was indeed appointed by the Court of Appeals, he "does not fall within the definition" and "therefore, Maryland Rule 1232 does not apply to him and his conduct cannot be judged by it" (Appendix B). Surely the spirit of that rule, if not the letter, applies to Mr. Cromwell and his office as Chairman of the Attorney Grievance Commission. One of the objectives of this rule is to prevent the prestige of a judicially-appointed position to be used to benefit "private interests." Not only did Mr. Cromwell receive approximately $30,000 for his testimony, but Respondent Gimmel also benefited greatly from Mr. Cromwell's appointment by the court. Such private profiteering gives the distinct impression of impropriety that should not be tolerated by the courts. Furthermore, in order to ensure the impartiality and fairness of the legal system, this rule should be broadened to specifically include the Chairman of the Attorney Grievance Commission of Maryland and other states.

Judge Bishop's minority view goes to the heart of the matter:

> "Because I am convinced that Mr. Cromwell's testimony, with respect to his judicial appointments, was highly improper and had absolutely nothing to do with his qualifications to testify with regard to the issues involved in this case, I dissent from the holding of the majority. I believe that the testimony was highly prejudicial and affected the outcome of this case. Based on the foregoing, I would reverse and remand for a new trial."

At a time when the legal system is enduring heightened public scrutiny and negative criticism, Defendant lawyers in a malpractice case should not be allowed to hire those appointed to positions of trust within the legal system in a blatant effort to gain an unfair advantage in trial. If such highly prejudicial testimony is sanctioned by the court, the integrity of the entire judicial system will be greatly harmed and public's confidence will be further eroded.

2. Is the Due Process Clause of the Fourteenth Amendment violated if a Trial Court gives preferential treatment to lawyers in legal malpractice cases by refusing to give Plaintiff's requested jury instruction concerning missing evidence?

Today, the legal system is suffering a significant lack of public confidence. One way to help restore faith in the system is to hold lawyers to a higher standard. Although the law states that the attorney-client relationship inherently creates a duty to preserve evidence, it is apparent that the lower courts are reluctant to hold lawyers to any such standard. Lawyers should not be allowed to destroy documents that would have allowed their clients to prove their case in court. Moreover, by denying relevant jury instruction relating to this issue, the courts are failing to hold lawyers to the high standard of their honorable and important profession.

The law in Maryland is clear that a party has the right to have his theory of the case presented to the jury in the form of appropriate jury instructions. See *Kennelly v. Burgess*, 337 Md. 562, 654 A.2d 1335 (1995). In this case, the Petitioner requested a missing evidence instruction which reads:

> "If you find that a party suppressed or destroyed evidence that would be relevant to the determination of an issue in this case, then you may consider the destruction or suppression of the evidence as an indication of consciousness by the party that the evidence would have been unfavorable to his case. However, the destruction of the evidence does not, by itself, amount to substantive proof of a fact essential to the opposing party's case."

The Trial Court refused to give this instruction stating: "As far as the spoliation, there is not enough evidence. So you are not going to get spoliation." But in fact, there is sufficient evidence of spoliation in the record to have allowed such an instruction. Gimmel testified that a number of drafts of the Shareholders Agreement were successively produced by him and reviewed by Mr. Norris. Gimmel further testified that he personally destroyed all these drafts of the Shareholders Agreements--including those which would have shown the disputed changes made by him or Mr. Norris during this critical time frame. In addition, Gimmel admitted that he had asked his paralegal to draft the buy-back agreement but "he personally made sure the agreement was never completed." However, that document in any form has never been produced. Mr. Norris believed that the Agreement had been completed and executed--and indeed paid for it when billed by Gimmel. It is undisputed that the key documents in this case were destroyed by Gimmel or his paralegal at his instruction. Thus, there is sufficient evidence to grant the spoliation request.

Furthermore, Respondent Gimmel has no research or notes whatsoever concerning the Shareholders' Agreement during the key time period of November, 1985 through May 1987. Contrary to the opinion of the Court of Special Appeals and the Appellees' assertion in their Brief, voluminous research and notes ***that belonged to Gimmel***

were found and presented to the jury concerning the 1983 Balsamo matter, the later SBA loan transactions, and numerous other corporate and personal activities relating to Mr. Norris and his companies that Gimmel ***personally*** handled (over 5,300 documents were produced by Gimmel in discovery). Furthermore, although Gimmel admitted that the "shareholders were in a fight" and "likely to be in litigation with each other," he claims that he did not do "anything with my files at that time.... Whatever would have been thrown away would have been thrown away far prior to May 6, 1987." The record is clear that there was sufficient evidence that Gimmel may have purged his files of incriminating evidence prior to discovery. This also justified the requested spoliation instruction.

An instructive Maryland case in this regard is the recent decision of this court in *DiLeo v. Nugent*, 88 Md.App. 59, 592 A.2d 1126 (1991). In that case, the Appellee/Plaintiff had testified that she destroyed her journal and gave the reasons for her actions [Id. at p. 70 and footnote 5]. The Appellant/Defendant argued that the journal was destroyed in order to withhold it from the jury because it would support the Appellant's case. Based on the foregoing, "The Trial Judge instructed the jury that the destruction of evidence by a party gives rise to an inference or a presumption that would be unfavorable to the person who destroyed or altered the evidence... [and] further explained that the nature of the inference which could be drawn from this evidence depended upon the Appellee's motivation. The Trial Judge left the possible determinations open to the jury." The court agreed with the instruction as given by the Trial Judge, noting that it was the jury's job to draw the appropriate inference based on the jury's view of the "intent or motive of the party who was responsible for the destruction." Finding that the Appellee "provided explanations for her failure to produce her journal," and that the jury was then given "the opportunity to evaluate the credibility of her explanations and draw inferences accordingly" the court found that the instruction was properly given [Id. at p. 71-72].

The missing evidence instruction requested by Mr. Norris in this case did not seek the imposition of any presumptions against Gimmel. Instead, it only sought to alert and permit the jury to their duty to appropriately weigh the evidence. In short, the requested instruction ***permitted***

the jury to draw appropriate inferences from Gimmel's admitted destruction of the key documents in this case as well as judge for themselves the credibility of his testimony relating to his conveniently missing notes and research. The refusal prejudiced the Petitioner in this case because it did not allow the jury to appropriately weigh the evidence and render these decisions of fact.

Although the majority of the Maryland Court of Special Appeals (two to one) upheld the lower court's refusal to give the spoliation instruction, they did so by ignoring the fact that Gimmel admitted that he destroyed certain key documents and that he had scores of notes relating to everything but the disputed Shareholders Agreement and the missing stock repurchase agreement. Moreover, the Court conveniently overlooked Appellee Gimmel's unique position of trust as an attorney. The law in Maryland is clear that lawyers must be held to a higher standard in order to protect not only their clients but the public's confidence in the legal profession. The attorney-client relationship inherently creates a duty to preserve any evidence stemming from the fiduciary obligations imposed upon attorneys by law. In fact, in this case, it is the attorney's own actions that made crucial evidence unobtainable.[4] The court has held in *Meyerberg, Sawyer and Rue v. Agee*, 51 Md. App. 711 (1982), that "exceptional perception is not relevant to the test of foreseeability when applied to an attorney who is relied upon by a layman...." See also *Wartzman v. Hightower Productions Ltd.*, 53 Md. App. 664 (1982). It is clear from the record that there was sufficient evidence to grant the spoliation instruction.

Attorneys should be held to a higher standard of conduct. It is apparent that the lower courts violated the Petitioner's constitutional right to due process by giving preferential treatment to the Respondent. It is unconstitutional for Respondent Gimmel or anyone for that matter to receive preferential treatment during any phase of the legal process.

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[4]A California case, *Sukoff v. Lemkin*, 202 Cal.App.3d 740, 249 Cal.Reptr. 42 (1988) has acknowledged that the burden of proof for showing causation may shift to the attorney when the attorney's own negligence has made evidence unobtainable that could have been used to prove the underlying case.

CONCLUSION

Today, a dark cloud of cynicism and mistrust hangs over the entire legal system. The public needs to know that the system can be fair and objective and that justice can be obtained by the ordinary citizen. In such a challenging environment, it is critical that this High Court take visible action whenever possible to bolster the public's confidence and trust in the legal system.

This case will give an opportunity for this Honorable Court to take action regarding the abuse of Defendant lawyers who are taking advantage of the legal system for

lawyers who are taking advantage of the legal system for their own ends. Defendant lawyers in malpractice cases should not be allowed to prejudice the jury by using judicially-appointed individuals (i.e., the Commissioner of the Attorney Grievance Commission appointed by the highest Court in the State of Maryland) as an expert witness. This action not only violates the due process rights of the Plaintiff, but reduces the legal system to a self-serving tool for those within it.

In addition, this case may be used to send a message to all lawyers that they serve the public in a fiduciary manner and therefore they are to be held to a higher standard of conduct. Moreover, this case can send a signal to the dubious public that "justice must satisfy the appearance of justice" [*Murchison*, 349 U.S. 133] and a fair trial in a fair tribunal is a basic requirement of due process [349 U.S. 136; *Aetna Life Insurance Co. v. Lavoie et al.*, 475 U.S. 813; 106 S. Ct. 1580].

For the reasons set forth above, the Petitioner respectfully urges this Honorable Court to issue a Writ of Certiorari.

Respectfully submitted,

Thomas A. Norris
Petitioner

August, 1996

APPENDIX A

APPENDIX A

THOMAS A. NORRIS et al.	*	**In the**
	*	**Court of Appeals**
v.	*	**of Maryland**
	*	**Petition Docket No. 698, Sept. Term 1995**
GIMMEL, WEIMAN, SAVITZ & KRONTHAL et al.	*	**(No. 1859, Sept. Term 1994, Court of Special Appeals)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answers filed hereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy

Chief Judge

Date: May 8, 1996

APPENDIX B

Appendix B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1859

September Term, 1994

THOMAS A. NORRIS ET AL.

V.

GIMMEL, WEIMAN, SAVITZ & KRONTHAL ET AL.

Bishop,
***Alpert,**
Salmon,

JJ.

Opinion by Salmon, J.
Dissenting Opinion by Bishop, J.

Filed: November 29, 1995

Alpert, J., participated in the argument and decision in this case but retired from the court prior to the filling of the opinion.

#58478

Appendix B

On April 30, 1990, Thomas A. Norris (Mr. Norris) and Heritage Development Corporation (Heritage) filed suit in the Circuit Court for Montgomery County against Gerald K. Gimmel (Mr. Gimmel) and Gimmel, Weiman, Savitz, and Kronthal, P.A. (Gimmel, Weiman). The suit sought compensation from Mr. Gimmel and his law firm and alleged that defendants were guilty of legal malpractice. Defendants filed a Motion for Summary Judgment, and at a hearing held on July 2, 1993, the court granted defendants' motion as to Heritage only.

The case was tried before a jury (Ferretti, J., presiding), beginning July 11, 1994. The jury rendered a verdict for defendants on July 22, 1994. Appellants filed a timely appeal and present the following questions, which have been rephrased and recorded for clarity:

I. Did the trial court commit reversible error when it refused to give Mr. Norris's requested jury instruction concerning "contract for life?"

II. Did the trial court commit reversible error when it refused to give Mr. Norris' requested jury instruction concerning missing evidence?

III. Did the trial court abuse its discretion by disallowing questions designed to impeach witnesses called by the appellees?

IV. Did the trial court commit reversible error by allowing the jury to hear "prejudicial" testimony from a defense expert witness?

V. Was Mr. Norris entitled to a "judgment of professional negligence" as a matter of law?

VI. Did the motions judge err as a matter of law by granting summary judgment against Heritage?

FACTS

Due to the overabundance of Thomases and Norrises in this appeal, we will use the following shortened names for ease of reference: Thomas A. Norris, one of the appellants, will be referred to as "Mr. Norris"; his father, Thomas E. Norris, as "T.E. Norris"; Mr. Norris's business partner, Thomas (no middle initial) Norris, no relation, as "Tommy Norris"; and his other business partner, Thomas Fowler, as "Mr. Fowler."

Mr. Gimmel and his law firm began representing Mr. Norris in 1981. Initially, they represented him in a domestic-relations matter. In 1982, Mr. Norris, Tommy Norris, and Gary Balsamo incorporated a business that became Party Time Discount Beer & Wine, Inc. (Party Time), each as holders of one-third of the outstanding stock in the corporation. The store was located in Wheaton, Maryland. Sometime in 1983, Mr. Balsamo attempted to take full control of the corporation by issuing a "special" distribution of Party Time stock to himself. Mr. James Savitz, a member of the Gimmel, Weiman, firm who had previously dealt with Mr. Norris and Tommy Norris, consulted with Mr. Gimmel in resolving the dispute with Mr. Balsamo. As a result, Mr. Norris and Tommy Norris bought out Mr. Balsamo's stock and became equal fifty-percent co-owners of Party Time, with Mr. Norris serving as president and treasurer, and Tommy Norris serving as vice president and secretary. Mr. Gimmel became Party Time's corporate counsel.

In 1984, Mr. Norris founded Heritage, a construction company. Mr. Gimmel became its resident agent and general counsel, and performed necessary legal services for the corporation.

In 1985, Mr. Norris developed a plan to expand Party Time by opening a second location in Prince George's County. He found a suitable site and arranged for a $580,000 Small Business Administration loan from First Women's Bank (FWB) in Rockville, Maryland. FWB would not authorize the loan unless Mr. Norris raised about $200,000 additional capital; therefore, Party Time ran an ad in *The Washington Post* for

investors. Mr. Fowler responded and ultimately agreed to purchase one-third of the stock of Party Time. By November 21, 1985, Mr. Norris and Tommy Norris had reached an understanding that they would bring Mr. Fowler aboard. Mr. Gimmel drafted a Shareholders' Agreement to implement this understanding.

Mr. Norris sent a letter to Mr. Gimmel on December 3, 1985, outlining the terms of his and Tommy Norris's agreement with Mr. Fowler; the Shareholders' Agreement was to incorporate the points made in this latter. One of the provisions was that Mr. Norris and Tommy Norris would each be paid $45,000 annually as President and Vice President, respectively, and that a "unanimous vote of all the shareholders will be required to raise these salaries." What happened next was disputed by the parties.

Mr. Norris's Testimony

Mr. Norris testified that he sought Mr. Gimmel's advice on how to bring in Mr. Fowler without losing control of the corporation; he wanted to avoid a repeat of the problems experienced with Mr. Balsamo in 1983. As matters stood on December 3, 1985, Mr. Norris could not be outvoted because he and Tommy Norris each had 50 percent of the vote. Mr. Norris expressed his wish to remain as president and in control of the corporation. Mr. Gimmel told him a Shareholders' Agreement could accommodate these wishes. MR. Gimmel also told him the unanimity provision for the increase of salary was not required because unanimous agreement would be needed to change any term in the agreement. Finally, Mr. Norris understood that the Shareholders' agreement protected his right to remain as president of the corporation "for life."

Mr. Gimmel's Testimony

Mr. Gimmel testified that, although Mr. Norris expressed his desire to remain permanently in control of the corporation, he (Mr. Norris) indicated that he thought that he would be able to accomplish this through an alliance (based on his friendship) with Tommy Norris. Mr. Norris did not want to make any changes to the corporation that would scare Mr. Fowler out of the deal. Mr. Norris never expressed a wish to be made president for life. The Shareholders' Agreement was drawn up to restrict Mr. Fowler's ability to transfer his Party

Time stock. The unanimity requirement regarding the increase in salary was taken out of the Shareholders' Agreement with Mr. Norris's consent so that Mr. Fowler could not veto Mr. Norris and Tommy Norris in case they wanted a raise. Mr. Gimmel said at trial that he had always believed a Shareholders' Agreement could not make someone "president for life." This testimony was contradicted, however, by his deposition testimony where he said he believed, at the time he drafted the Shareholders' Agreement, that, unless there was unanimous consent among the shareholders, Mr. Norris would remain president in perpetuity. At trial, he opined that the corporate by-laws prevented someone from contracting to be president for life.[1] He did not remember discussing the by-laws with Mr. Norris when they met to draw up the Shareholders' Agreement.

Tommy Norris' Testimony

Tommy Norris testified that he believed the Shareholders' Agreement only preserved Mr. Norris's control of the corporation if he voted with Mr. Norris.

Mr. Fowler's Testimony

Mr. Fowler testified that he would have never signed the Shareholders' Agreement if he thought it gave Mr. Norris the right to be president for life and the right to control the corporation.

Other Evidence

Mr. Norris and Tommy Norris, both in their capacity as officers of Party Time and individually, and Mr. Fowler signed the Shareholders' Agreement on December 12, 1985. The pertinent part s of the agreement read as follows:

IT IS THEREFORE AGREED:

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[1] Article IV, §3 of the by-laws stated: "Removal: Any officer or agent may be removed by the Board of Directors whenever in its judgment, the best interests of the corporation will be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed.

Appendix B

1. That the shareholders of the corporation agree to vote their stock to elect to the Board of Directors, Thomas A. Norris, Thomas (NMI) Norris, and Thomas R. Fowler, or their respective designees....

...

10. That the following persons shall act as officers of the corporation...:

1) President Thomas A. Norris

...

2) Vice President/Secretary Thomas (NMI) Norris

...

3) Treasurer Thomas R. Fowler

...

12. This Agreement shall be binding upon and shall operate for the benefit of the shareholders and their respective heirs....

Once the stock transfer to Mr. Fowler was completed, Party Time continued with its plan to open a restaurant and package store in Prince George's County. Mr. Norris retained counsel in Prince George's County to assist him in obtaining a liquor license because Mr. Gimmel was unfamiliar with the process. When Mr. Norris learned that in order to get a Prince George's County liquor license it was necessary to have a resident of Prince George's County own at least 25 percent of the corporation,[2] he decided to transfer 25 percent of the outstanding Party Time stock to his father, T.E. norris, a Prince George's County resident. Mr. Norris told Mr. Gimmel that, because he would be transferring the majority of stock owned by him and would thereby chance losing control of Party Time, he would only complete the deal if the transfer agreement included an "irrevocable buy-back provision" that he could exercise if something went wrong. He wrote to Mr. Gimmel on January 2, 1986, requesting that Mr. Gimmel draw up the necessary papers. A paralegal at Gimmel, Weiman, began to draft such a Buy-Back Agreement.

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[2] See Md. Code (1957, 1994 Repl. Vol., 1995 Supp.), Art. 2B § 9-101(d)(3) (a license may not be transferred unless "bona fide residents of Prince George's County own 25% of the total issued capital stock of the corporation").

Here again, the testimony as to what happened next differs. Mr. Norris testified that he assumed that such an irrevocable Buy-Back Agreement had been drawn up; therefore, he went forward with the transfer of 70 shares to his father, leaving him with only 8 percent of the outstanding stock in Party Time. Mr. Gimmel testified that Mr. Norris called him and instructed him to stop any further efforts with respect to the Buy-Back Agreement because Prince George's County did not allow such agreements with the resident stockholders.[3] Mr. Gimmel testified that he "personally made sure the agreement was never completed" because Mr. Norris told him that "he had checked and there might be a problem with the Prince George's County liquor license application and [therefore] do not do the buy-back agreement." The Party Time stock was transferred to T.E. Norris on January 11, 1986.

In August 1986, FWB insisted that Mr. Norris's wholly-owned construction company, Heritage, be added as a guarantor on the $580,000 loan. Mr. Norris discussed this development with Mr. Gimmel and was advised to go ahead and allow Heritage to become a guarantor.

Tommy Norris and MR. Fowler visited Mr. Gimmel on April 30, 1987, stating they wished to hold a Party Time shareholders' meeting on May 6 to discuss the transfer of stock from Heritage to Mr. Fowler and Tommy Norris and the allocation of funds between Party Time and Heritage. Upon MR. Gimmel's recommendation, Tommy Norris and MR. Fowler agreed to discuss at the meeting whether Party Time should hire Edward Quinn as a financial consultant. Mr. Norris was notified of this meeting, in writing, on the same day. Mr. Norris then called Mr. Gimmel to find out what was going on. Mr. Gimmel explained that Tommy Norris and MR. Fowler had visited his office to set up a meeting, and that he had spoken

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[3] Under applicable law governing liquor license transfers, the proposed Buy-Back Agreement would have been illegal. The shareholders of a corporation applying for a Prince George's County liquor license must sign an affidavit stating that each is the true owner of the stock and "there exists no collateral agreements, promises, restrictions, or commitments, regarding the change of ownersh of said stock or future endorsements, assignments, transfer, pledge, or change of ownership of aforesaid stock."

with them about retaining Mr. Quinn. Later that same day, Mr. Norris sent a memo to Mr. Fowler, Tommy Norris, and Mr. Gimmel requesting that two items be added to the agenda of the May 6 meeting: changing Party Time's officers and buying Tommy Norris out of the corporation.

On May 1, 1987, Mr. Fowler and Tommy Norris removed Mr. Norris's name from the corporate bank accounts and changed the locks on the Party Time store in Wheaton. Mr. Norris called Mr. Gimmel on May 4 to advise him of these actions. MR. Gimmel suggested that Mr. Norris do nothing until the shareholders' meeting, where the shareholders' differences might be resolved.

The meeting was held on May 6, 198 in Mr. Gimmel's office. Mr. Fowler moved to have Mr. Norris removed as president of Party Time. The minute reflect that the following then occurred: "Mr. Thomas (NMI) Norris seconded the motion. Mr. Thomas A. Norris stated that he believed that this was illegal under the Shareholders' Agreement. The parties asked of counsel and counsel advised that the Shareholders' Agreement had been approved by each shareholder and the Board of Directors of the Corporation." Mr. Fowler voted in favor of the motion, Mr. Norris voted in opposition, and Tommy Norris abstained. All the Thomases, except T.E. Norris, signed an agreement that resolved to continue operating the business and to hire Mr. Quinn to analyze Party Time's business problems. Within a matter of days, it was apparent that the shareholders would not honor the agreement.

Mr. Norris, on May 11, contacted Mr. Gimmel and requested that he draw up any papers necessary to dissolve the corporation, unless the stockholders could work out "an expeditious and a mutually agreeable stock buy-out." The next day, Mr. Gimmel sent a letter to all four Thomases who held stock in Party Time advising them that he could no longer represent any of them or Party Time. Mr. Fowler and Tommy Norris called a shareholders' meeting on May 19, 1987, at which they removed Mr. Norris as president of Party Time. Mr. Norris attempted to reacquire the shares of Party Time that he had sold to his father, T.E. Norris. Mr. Norris's father refused to make the transfer. According to Mr. Norris's testimony, it was at that time that he first learned that the irrevocable Buy-Back Agreement had never been completed or signed.

Party Time filed for bankruptcy in November 1987. As a result of Heritage's liability as guarantor of the FWB loan, Heritage filed for bankruptcy in June 1988.

Additional facts will be added as necessary to address the issues presented.

DISCUSSION

I. Did the trial court commit reversible error when it refused to give Mr. Norris's requested jury instruction concerning "contract for life"?

One of the key issues at trial was what the Shareholders' Agreement was intended to provide. Mr. Norris asserted that he had hired Mr. Gimmel to draft the agreement to help him preserve his control over Party Time by remaining "president for life." Mr. Gimmel asserted that the Shareholders' Agreement could not have so provided in light of Party Time's by-laws, and such a provision would, in any case, be void as against public policy.

Mr. Norris requested that the trial judge instruct the jury on the law of "contract for life." We quote extensively from the record here to make clear what transpired below:

> **MR. WHITWORTH [COUNSEL FOR MR. NORRIS]:** I am going to ask for another instruction, if you will hear me on it on the position for life. I have a Maryland case on point .... *So I have it drafted.*
>
> **THE COURT:** What is the case and the issue?
>
> **MR. WHITWORTH:** Contract for life. I will give you the Maryland case, Chesapeake and Potomac Telephone Company of Baltimore City [sic] versus Murray. The Maryland cite on this is 198 Maryland 526.
>
> **THE COURT:** What is your position of the holding of the case?
>
> **MR. WHITWORTH:** The position is if an employee has purchased permanent or life employment for

valuable consideration to the services which he is contracted to render[,] a discharge without good cause may constitute a breach of the contract.

THE COURT: This contract is not -- this is an employment contract for [life].

MR. WILSON [COUNSEL FOR APPELLEES]: Yes, sir, not an offic[ial] position.

MR. WHITWORTH: But wait a minute. [Mr. Norris's] position is that he gave up an interest in this business to remain as president and control of this company. He gave up something other than just his services or the salary.

He was 50/50. He diluted his interest to be retained as president....

THE COURT: ***That is not what we are talking about here. We are not talking about an employment contract for life. We are talking about control for life.***

MR. WHITWORTH: He was talking about both. To him president meant control. I mean, that is obvious, and control meant president.

THE COURT: ... In contrast to all the other people in this case, I am not too sure what the law is, but I really have some real problems -- and my gut is usually right -- about making somebody a president of a corporation for life without being able to be removed. I really have some problems about that.

Somebody talked about the fiduciary duty to the corporation. There is a fiduciary duty to the stockholders. The Board of Directors has a fiduciary duty to the stockholders so that if somebody does something bad you have got to be able to remove them.

MR. WHITWORTH: Right, and this says remove for cause. You can remove them for cause, but absent cause -- ....

> **THE COURT**: This is an employee. This is a different case. I am not willing to give that instruction. ***You have protected the record. What you should do to protect the record you draft up instructions so that you can take exceptions.***
>
> **MR. WHITWORTH**: Okay. Do you want to keep that?
>
> **THE COURT**: I don't need to keep it. I know the case well, December 5, 1951.... That case came up in another context really.

(Emphasis added.)

Appellants argue that "I is clear that some writing was made and presumably handed to the Court [... 'I have it drafted']." The record, however, does not contain a draft of a proposed jury instruction regarding the law of "contract for life."[4] Moreover, in view of Judge Ferretti's admonition to "draft up instructions so that you can take exceptions," it is unlikely, in the extreme, that any instruction was handed to the judge. Based on the record, it appears that what was handed to the trial judge was a copy of *C&P Telephone v. Murray*, which was decided December 5, 1951.

After the trial judge instructed the jury, Mr. Norris's attorney objected to his failure to give an instruction "on the issue of employment for life." The judge denied the request again, saying, "[W]e considered that case ***[C&P Telephone v. Murray***]. That really is an employment case, and this is really a different kind of fish."

Appellants argue a "party has the right to have his theory of the case presented to the jury.... [T]his right only encompasses the presentation of theories which are proper statements of the law." ***Kennelly v. Burgess***, 337 Md. 562, 574 (1995).

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[4] At oral argument, appellants' counsel (who was not counsel below) admitted that he had never seen the missing "contract for life" instruction.

"[I]t is the responsibility of the party proposing [a jury] instruction to make a proper request, which includes submitting to the trial court the contents of the proposed instruction." ***Kammer v. Young***, 73 Md. App. 565, 584, ***cert. denied***, 312 Md. 602, ***cert. denied***, 488 U.S. 919 (1988). The instruction may be proffered to the court either orally or in writing. ***See id.*** Some proffer, no matter what the form, must be made in order for this Court to review the propriety of the trial court's refusal to give the instruction. ***See*** Md. Rule 2-520(e);[5] ***Kammer***, 73, Md. App. at 585 (holding that appellant "failed to state adequately the grounds for his objection ... because [appellant] failed to provide the court with a proposed instruction"),

Mr. Norris failed to orally put on the record a jury instruction regarding "contract for life" and did not submit a written one, although strongly advised to do so by the trial judge. He has thus failed to preserve properly his objection on this issue.

Appellants argue that the trial judge's refusal to instruct the jury was compounded by the fact that appellees' expert witness, James Cromwell, was permitted to testify that providing for someone to be "president for life" is unlawful. Appellants content this was reversible error because it allowed an expert to give an opinion on the governing law. See Adalman v. Baker, Watts & Co., 807 F.2d 359, 368 (4th Circ. 1986) (holding that expert testimony is not allowed as to meaning and applicability of law to transactions at issue in case); ***Cider Barrel Mobile Home v. Eader***, 287 Md. 571, 584 (1980) ("opinion of expert on matter of law may be inadmissible").[6]

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[5] Appellant relies on Maryland Rule 4-325 in arguing that the court must "at the request of any party..., instruct the jury as to the applicable law." Md. Rule 4-325(c). This reliance is misplaced, however, as Maryland Rule 4-325 applied only in criminal cases. The language cited does not appear in Maryland Rule 2-520, which applies to civil cases such as this one.

[6] Appellants make this argument despite the fact that, prior to Mr. Cromwell's testimony, Mr. Norris called an expert witness, William Mann, who testified it was legal to structure an agreement that would keep Mr. Norris as president for life. Prior to Mr. Cromwell's testimony, Mr. Gimmel testified, without objection, as to his opinion regarding the legality of contracting to become president for life.

Appellants base their argument on the following change at trial:

> **[JAMES CROMWELL]:** ... [I]t is my understanding of the law ... that a stockholders' agreement can't make someone president for life because it is against public policy.
>
> **[COUNSEL FOR APPELLEES]:** Why is that, sir?
>
> **A:** The reason is that it is against public policy because there are things that can happen in the running of a corporation or any other business that you may not be able to foresee in the beginning.
>
> For instance, suppose you have someone who ends up being an alcoholic or ends up being addicted to drugs or ends up embezzling money or ends up being --
>
> **MR. WHITWORTH:** Objection, Your Honor. He is going way beyond the perimeters.
>
> **THE COURT:** This is not inappropriate. I will overrule the objection. There is no indication that any of these factors are involved in this particular case. He is talking about why you can't be president for life, and given that I am going to permit him to respond.

Counsel for Mr. Norris did not object at trial to Mr. Cromwell's testimony that a person cannot legally be made "president for life"; he objected to Mr. Cromwell stating reasons for this public policy as "going way beyond the perimeters." His present argument that Mr. Cromwell usurped the function of the judge by giving an opinion as to the law was not presented to the trial judge and was therefore not preserved. See ***Thomas v. State***, 301 Md. 294, 328 (1984) ("'where specific grounds are delineated for an objection, the one objecting will be held to those grounds and will ordinarily be deemed to have waived grounds not specified'"), ***cert. denied***, 470 U.S. 1088 (1985).

II. Did the trial court commit reversible error when it refused to give Mr. Norris's requested jury instruction concerning missing evidence?

Counsel for Mr. Norris requested that the trial judge give the following jury instruction:

> If you find that a party suppressed or destroyed evidence that would be relevant to the determination of an issue in this case, then you may consider the destruction or suppression of the evidence as an indication of consciousness by the party that the evidence would have been unfavorable to his case. however, the destruction of the evidence does not, by itself, amount to substantive proof of a fact essential to the opposing party's case.

The trial judge denied this request, stating, "As far as spoliation, there is not enough evidence. So you are not going to get spoliation."

In reviewing the propriety of a trial judge's refusal to give a requested jury instruction, we must "determine whether the requested instruction was a correct exposition of the law, ***whether that law was applicable in light of the evidence before the jury***, and finally whether the substance of the requested instruction was fairly covered by the instruction actually given." ***Wegad v. Howard St. Jewelers***, 326 Md. 409, 414 (1992) (emphasis added). There is no dispute that the proffered jury instruction is a correct statement of the law. What is at issue is whether there was evidence showing that appellees suppressed or destroyed relevant documents: drafts of the Shareholders' Agreement, the Buy-Back Agreement, and notes or research pertaining to those documents.

Appellants cite several examples of alleged spoliation of evidence by appellees. First, Mr. Gimmel testified that he proposed a number of drafts of the Shareholders' Agreement for Mr. Norris's review. Mr. Gimmel testified that he destroyed the first draft once it had been modified and he was only able to produce the final draft of the agreement. Second, MR. Gimmel testified that he did not have a copy of the Buy-Back Agreement that Mr. Norris had instructed him to prepare in January 1986. Mr. Gimmel further testified that he did not remember if he ever actually saw a copy of the agreement, but that he made sure it

was never completed. Mr. Norris was billed for time spent preparing the agreement. Third, Mr. Gimmel testified that he took no notes during telephone conversations or personal meetings with Mr. Norris about preparing the Shareholders' Agreement or the Buy-Back Agreement. Mr. Gimmel testified that any notes taken or drafts prepared would have been routinely thrown away after the documents were finalized. Appellants point out that Mr. Gimmel produced no "letters or memoranda memorializing any of his conversations, recommendations, or actions relating to" the Shareholders' Agreement or the Buy-Back Agreement during the time period of November 1985 through May 6, 1987. He also had no research in his files concerning the Shareholders' Agreement or the Buy-Back Agreement.

Appellants apparently contend that Mr. Gimmel should have research materials and notes from telephone conversations because "voluminous" research and notes were found in the files pertaining to the 1983 Balsamo matter. Mr. Gimmel testified that, although some of the notes in the Balsamo files were taken by him, he was not the attorney primarily responsible for the 1983 Balsamo matter; Mr. Savitz, another attorney in the firm, had handled that matter. "On a regular basis, when I finish with a document, I throw away ... some of the other stuff so that I don't end up with a lot of fat files." Appellants also apparently contend that, because Mr. Gimmel took notes at the May 6, 1987 stockholder meeting, he must have taken notes at other times.

There was no evidence presented at trial that Mr. Gimmel destroyed or directed his paralegal to destroy the Buy-Back Agreement. In addition, Mr. Gimmel uncontradictedly testified that he did not take notes during many of his meetings and conversations with Mr. Norris; therefore, much of the allegedly "destroyed' evidence never actually existed. Further, MR. Gimmel offered a reasonable explanation for the information that he admitted throwing away: it was not necessary to keep all the drafts, notes, and research once the document was finished; all he kept was the finished product. Finally, Mr. Gimmel uncontradictedly testified that he did not throw away any documents or notes after May 1987 when it became apparent to him that litigation among the shareholders was impending. See ***Lavalette v. Noyes***, 205 A.2d 413 (Vt. 1964) (holding no presumption of falsity arises from the destruction of a document by someone who had no apparent

reason or obligation to preserve it); cf. ***Love v. Dilley***, 64 Md. 238, modified, 64 Md. 247 (1885) (the destruction of a document by a person claiming under it, after he knows that there is to be a difficulty about it, is strong presumptive evidence that its terms were unfavorable to his claim). Mr. Norris did not prove that appellees suppressed or destroyed evidence that he had any reason to know that he should preserve. Therefore, we hold that the trial judge did not err in denying Mr. Norris's requested jury instruction regarding spoliation of evidence.

III. Did the trial court abuse its discretion by disallowing questions designed to impeach witnesses called by the appellees?

Two of the avenues of inquiry that Mr. Norris contends were closed to him at trial have not been preserved for appeal. Mr. Norris argues that the trial judge abused his discretion by disallowing cross-examination of Tommy Norris on his failure to pay taxes and on his "party Time bankruptcy perjury." Counsel for Mr. Norris asked Tommy Norris if he had ever been involved with "taking care" of the payroll taxes or any other IRS filings for Party Time. Tommy Norris answered a question on this issue relating to his actions in this area prior to May 1, 1987, the trial judge sustained an objection by appellees. Counsel for Mr. Norris made no proffer of a reasonable basis for either the initial inquiry or any further inquiry; therefore, we are unable to know whether he was harmed by the trial judge's ruling. See Keys v. Keys, 251 Md. 247, 250 (1967) ("The lower court's action in sustaining the objection is not subject to review since appellants ... [did not make] a formal proffer of what the testimony would be."); cf. Md. Rule 5-608 (b) ("Upon objection, however, the court may permit the inquiry only if the questioner ... establishes a reasonable factual basis for asserting the conduct of the witness occurred.").

Questioning of Tommy Norris about the so-called "Party Time bankruptcy perjury" was as follows:

> **[MR. WHITWORTH]:** Now, the money that was brought in by Mr. Fowler, was that to be as a debt owed to Mr. Fowler, as a loan, or was it for equity in Party Time?

MR. WILLSON: Objection. Your Honor, can I approach on this?

THE COURT: All right.

...

MR. WILLSON: I didn't talk about that. I assume he is going to go to something in the bankruptcy document where he said this, that or the other. He is trying to set up a --

THE COURT: Yes, he didn't talk about that at all, except "We needed the money." ...

I am going to sustain the objection. I think it is collateral.

Again, counsel for Mr. Norris made no proffer of a reasonable basis for either the initial inquiry or any further inquiry. Therefore, we are unable to know whether Mr. Norris was harmed by the trial judge's ruling. See Md. Rule 5-608(b); ***Keys***, ***supra***, 251 Md. at 250.

Two other areas were clearly closed to Mr. Norris's inquiry by the Maryland rules of evidence. Counsel for Mr. Norris attempted to question Tommy Norris about his and Mr. Fowler's "hostile takeover" of Party Time.

[MR. WHITWORTH]: By the time of the May 6th meeting, you and Mr. Fowler had already taken Thomas A. Norris's name off the First Women's Bank accounts, hadn't you?

TOMMY NORRIS: Yes, we had.

Q: Okay. You had locked him out of the store over in Wheaton. Isn't that correct?

A: Correct. Well, I don't know what you mean by "Locked him out."

Q: Okay. Well, you changed the locks so that he didn't have a key.

A: We didn't do that.

MR. WILLSON: Objection, beyond the scope, Your Honor.

THE COURT: Sustained.

Appellees' counsel made no motion to strike the testimony, and after the "scope" objection was sustained, Mr. Norris's counsel moved to another subject.

Mr. Norris contends he should have been allowed to question Tommy Norris further about the hostile takeover as an example of "Prior conduct that did not result in a conviction but that [is] probative of a character trait of untruthfulness." Md. Rule 5-608(b). It is important to keep in mind what this trial was about: Whether Mr. Gimmel and his law firm breached the standard of care for an attorney in regard to the stock transfer to T.E. Norris, in drafting the Shareholders' Agreement, and in advising Mr. Norris on that agreement. Whether Tommy Norris changed the locks on the doors of Party Time is clearly collateral to most issues and does not bear on his credibility as a witness. As it does not touch on credibility, it was properly excluded as beyond the scope of direct. Md. Rule 5-611 ("cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness").

Mr. Norris also contends that the trial judge should not have restricted cross-examination of Tommy Norris and Mr. Fowler on e issue of statements made by them on an application for a permit to carry a handgun. Counsel for Mr. Norris established at trial that Mr. Fowler and Tommy Norris did not know each other before late 1985. Mr. Norris's counsel then asked Mr. Fowler on cross-examination whether he had signed a document on October 7, 1986, "under the penalties of perjury,"[7] stating that he had known Tommy

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[7] Mr. Fowler had signed the gun permit application as Tommy Norris's reference. Perjury is a false oath or affirmation made:

> First, in all cases where false swearing would be perjury at common law; secondly, in all affidavits

Norris for more than three years. Mr. Fowler replied that he did not recall signing any document. Mr. Norris's counsel then attempted to show the document to the witness. The trial judge called the attorneys to the bench and, the following occurred:

> **THE COURT:** It is collateral. It is very collateral. Isn't it collateral?
>
> **MR. WILLSON:** This is a gun application I think.
>
> **MR. WHITWORTH:** It is an application -- he is signing documents under oath lying about -- it goes to his credibility, Your Honor.
>
> **MR. WILLSON:** For a gun. For a gun.
>
> **THE COURT:** But it is on ... a collateral matter. Once he said no, you are stock with that. You can't ... disprove it.

The trial judge sustained appellees' objection. Mr. Norris contends he should have been able to explore the issue further. The rule is clear, however, that the prior bad conduct "May not be proved by extrinsic evidence." Md. Rule 5-608(b). Counsel

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> to required by law to be taken; thirdly, in all affidavits accounts or claims made for the purpose of inducing any court or officer to pass the accounts or claims; fourthly, in all affidavits required to be made to reports and returns made to the General Assembly or any officer of the government; fifthly, in all affidavits or affirmations made pursuant to the Maryland Rules or Maryland District rules.

Md. Code (1957, 1992 Repl. Vol.), Art. 27 § 435.

The person who acts as a reference must have his signature notarized. Mr. Fowler and tommy Norris both signed the document but did not have their signatures notarized. As there was no "perjury" committed by either party, there was no basis for inquiry on this subject.

for Mr. Norris was permitted to question MR. Fowler about whether he had lied, under the penalties of perjury, on Tommy Norris's application for a gun permit; and under the Maryland rules of evidence, he is bound by the witness's answer.

Appellants also attempted to impeach Tommy Norris with the gun permit application:

> **MR. WHITWORTH:** Now, had you ever known Mr. Fowler before October of 1985?
>
> **A:** No. The first time I met him was when we were trying to get an investor, if that is what you are asking.
>
> **Q:** Okay. Did he ever sign an affidavit in support of your application for a gun license?
>
> **MR. WILLSON:** Objection.
>
> **THE COURT:** I will sustain the objection.
>
> **MR. WHITWORTH:** Were you aware that in 1986 Mr. Fowler claimed to have known you for three and a half - -
>
> **MR. WILLSON:** Objection, Your Honor.
>
> **THE COURT:** Sustained. Strike that.

This line if inquiry is clearly not permitted because it does not go to a prior bad act of the ***witness being questioned***, Tommy Norris. See Md. Rule 5-608(b) ("The court may permit any witness to be examined ***regarding the witness's own prior conduct...")*** (emphasis added). Mr. Norris was attempting to impeach Tommy Norris based on the prior bad act of Mr. Fowler, who allegedly lied on a gun permit application. This clearly had no relevance to Tommy Norris's credibility.

The remaining avenues of inquiry Mr. Norris contends were closed at trial are best discussed after a brief look at what circumstances permit impeachment as to collateral matters. A witness may be cross-examined "on such matters and facts as are likely to affect his credibility, test his memory or knowledge,

show his relation to the parties or cause, his bias, or the like." ***Kantor v. Ash***, 215 Md. 285, 290 (1958). "[C]ross-examination will not be permitted on matters that are immaterial or irrelevant to the issue being tried." ***State v. Cox***, 298 Md. 173, 178 (1983).

"[I]t is the responsibility of the trial judge to determine the relevance and materiality of the alleged prior misconduct, for it is purely collateral to the issue on trial and should only be admitted if probative of a lack of credibility." ***Id***. at 180. The trial judge has discretion in this process, "for he must balance the probative value of an inquiry against the unfair prejudice that might inure to the witness. Otherwise, the inquiry can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion." ***Id***. at 178. The trial judge must be satisfied that four factors are present before allowing a witness to be cross-examined on prior bad acts: that the act is relevant to the witness's credibility, that "there is a reasonable basis for the question, that the primary purpose of the inquiry is not to harass or embarrass the witness, and that there is little likelihood of obscuring the issue on trial." ***Id***. at 179.

Counsel for Mr. Norris attempted to question Mr. Fowler about the circumstances surrounding his departure from his position as a computer programmer at the Washington Suburban Sanitary Commission (WSSC). The following dialogue occurred at trial:

> **MR. WHITWORTH:** In terms of your background, what kind of employment or work experience had you had before December of 1985, in general?
>
> **MR. WILLSON:** Objection. Relevance.
>
> **THE COURT:** Overruled.
>
> **[MR. FOWLER]:** I was a computer programmer.
>
> **MR. WHITWORTH:** You worked for a governmental entity known as WSSC, is that correct?
>
> **MR. WILLSON:** Your Honor, may we approach on this? ... [A bench Conference ensued.] I think that

there is some allegation that he lied about WSSC. I think he is going into that.

MR. WHITWORTH: He was fired -- there was a Court case about it. He was fired for stealing computer time at WSSC, Your Honor, and it came down right around the time of the events in this case. ... It goes to his motivation for why he changed his course in this case.

MR. WILLSON: There is no conviction. There is no -- I believe that that is disputed by Mr. Fowler. ...

MR. WHITWORTH: His termination from his employment was sustained by a Court.

THE COURT: The fact that he was terminated, you are not going to -- I am not going to let you ask him that. That doesn't go to his credibility. What do you say goes to his credibility?

MR. WHITWORTH: He was stealing computer time, Your Honor. He was charged with -- that charge was sustained in a Court proceeding.

THE COURT: No, I don't think --

MR. WHITWORTH: In a civil Court proceeding.

THE COURT: Well, I don't know about that, he was fired. I am going to sustain the objection.

Mr. Norris's counsel did not make a clear proffer of what question he intended to ask Mr. Fowler, but it appears he was going to ask, "Were you fired from your job at WSSC for stealing computer time?" This is an improper question because it is a mere accusation of misconduct that is clearly hearsay. "[W]hen impeachment is the aim, the relevant inquiry is not whether the witness has been accused of misconduct by some other person t whether the witness actually committed to the prior bad act." ***Cox, supra***, 298 Md. at 181.

Lastly, Mr. Norris contends the trial judge abused his discretion by disallowing and striking from evidence testimony regarding Mr. Fowler allegedly forging several checks. Appellees' counsel asked Mr. Fowler on direct examination, "In May of 1987 ... did you do something you are not entirely proud of [?]" Mr. Fowler responded that he had "tried to cash one or two checks" that belonged to Heritage. Appellees asked the witness why he had done this. Mr. Fowler said, "I was trying to get back some of the money that -- $160,000 that I had given to --." At this point, counsel for Mr. Norris objected "as to why" and moved to strike the answer. The objection was overruled; however, Judge Ferretti did not allow Mr. Fowler to continue his explanation. A few minutes later, at a bench conference, the following occurred:

> **MR. WHITWORTH:** The last evidence adduced by the defense in this case is they had Mr. Fowler, perhaps without benefit of Counsel, admit to a crime. He admitted he tried to pass forge[d] checks in Heritage Development Corporation.
>
> ...
>
> **MR. WILLSON:** Well, Your Honor, the problem is if we didn't bring it [out] now, they are going to bring it [out] on cross.
>
> **MR. WHITWORTH:** Well, he could have taken the Fifth if I had asked him out of the clear blue, Your Honor. Now they had had him testify to it, and I don't think he had the benefit of counsel.

(Emphasis added).

Mr. Norris's counsel made clear that he wanted to cross-examine on the subject of the allegedly "forged checks"[8] so that Mr. Fowler would exercise his Fifth Amendment right in front of the jury:

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[8] Counsel for Mr. Norris proffered that Mr. Fowler had taken two checks from Tommy Norris, who had been given the checks in blank by Mr. Norris for Heritage purposes, stamped Mr. Norris's name on them, and attempted to negotiate them.

THE COURT: ... I have got some real problems. This guy has blurted this out. He is not protected. I will think about what I can do. There are various things I can do.

One is I can strike it, just leave it alone, and not let you cross examine, but I can't let you do that. I can't -- if you brought it up, and he took the Fifth Amendment--

MR. WHITWORTH: ***Then we would have had a record of him taking the Fifth.***

THE COURT: No. That is what I am not going to let you get in front of the jury is him taking the Fifth Amendment. That is not permissible. I do it outside the presence of the jury.

We are not going to get in a position where he takes the Fifth Amendment and then the jury is going to hold it against him...

MR. WHITWORTH: It goes to his credibility, Your Honor. This guy tried to pass checks he knew he had absolutely no right to.

MR. WILLSON: That is not what he said though. He felt as though he was owed the money.

(Emphasis added.)

After a lunch recess, the trial judge announced he was going to strike the testimony as purely collateral. Mr. norris argued the evidence "goes to his credibility, and his truthfulness":

TRIAL COURT: You know what? You are absolutely right. It does go to his credibility. But how are you going to ask him? Are you going to ask him whether he did that? He is going to testify --

MR. WHITWORTH: ***He is going to take the Fifth Amendment.***

...

TRIAL COURT: I am going to strike that and tell the jury not to give any weight to it at all, because it shouldn't have come in in the first place, because Counsel made a mistake. First, not telling me about it. Two, by offering something in on his credibility when his credibility wasn't in issue.

...

MR. WHITWORTH: Your Honor, I think it is fair game for me, Your Honor.

THE COURT: I am not going to give you the opening which -- because I wouldn't have let you put it in in the first place.... His credibility may be an issue in this case. It may not be an issue in this case.

MR. WHITWORTH: It is an extreme issue, and we will go through a lot of credibility issues.

THE COURT: Why?

MR. WHITWORTH: Because he is sitting there saying things that are directly the opposite to what he said under oath on other occasions regarding this money and what his --

THE COURT: Not the money, but what his agreement was.

MR. WHITWORTH: That is right.

THE COURT: That is the real issue....[T]he issue isn't these alleged checks that he passed off for a corporation that is not even part of this case. I am going to strike that, and that is the way I am going to deal with it.

Judge Ferretti addressed the jury, saying:

Counsel asked Mr. Fowler about something he was not very proud of, and there was some testimony about -- something about Heritage Development checks.

> You just strike that. Strike that. You won't be able to forget it, but don't let it play any role in your evaluation of this witness or in this case at all. That testimony never should have come before you.
>
> If I had known ... that there was going to be some testimony that even came close to that, I wouldn't have let Counsel ask the question. It is inappropriate that it came in here, so I am just going to tell you just do not let that testimony play any role.
>
> If you made a note about it, strike out that note right now. Thank you.

It is clear from the quoted matter above that Mr. Norris's counsel's primary purpose in asking Mr. Fowler about the Heritage checks was to "harass and embarrass" the witness by forcing him to exercise his Fifth Amendment rights in front of the jury. Under these circumstances, the trial judge did not err in striking the testimony regarding the forgery of checks belonging to Heritage.

IV. Did the trial court commit reversible error by allowing the jury to hear "prejudicial" testimony from a defense expert witness?

James Cromwell, an attorney in Montgomery County, was called as an expert witness by appellees to testify as to the standard of care owed by Mr. Gimmel. When appellees' counsel was attempting to establish Mr. Cromwell's credentials as an expert, the following exchanges occurred:

> **[MR. WILLSON]:** Were you also involved with the Committee on Lawyers Professional conduct, sir?
>
> **[MR. CROMWELL:** Yes, I am --
>
> **THE COURT:** Overruled.
>
> **THE WITNESS:** I am a member of a couple of committees. One of them is the Committee on Professional Conduct which is a special committee that

has just been created by the State Bar to look at matters involving professional conduct.

...

[MR. WILLSON]: Sir, have you been appointed by the Court of Appeals in the State of Maryland for any positions?

[MR. CROMWELL]: I have been.

Q: What have they appointed you, sir?

A: I am currently the Chairman of the Attorney Grievance Commission in Maryland. That is a 10 member commission that oversees the subject matter of lawyer discipline and lawyer conduct and is responsible for the disciplining of lawyers and incompetence and incapacity of lawyers. It covers a variety of subjects.

MR. WHITWORTH: Your Honor, we object and wish to approach.

At the bench, Mr. Norris's counsel objected on relevancy ground. The trial judge overruled the objection. Appellants' counsel then said he was going to ask for an "advisory instruction" that the testimony was irrelevant. The judge said he would take the issue of instruction under advisement. Counsel then said:

> -- makes it sound like he is operating in a quasi-judicial capacity, Your Honor, and I think that is misleading to the jury and it adds an unfair bias to this witness that frankly is prejudicial given the fact that they filed a motion in limine that those issues not even be addressed.

The bench conference then ended. An advisory instruction was not subsequently given.

Appellants contend that Mr. Cromwell should not have been allowed to tell the jury about his current position as Chairman of the Attorney Grievance Commission of Maryland

and his involvement with the Maryland Bar Association Committee on Lawyers Professional Conduct.[9]

"'It is well established that a person must demonstrate a minimal amount of competence or "expertise" on the subject on which he is allegedly an expert in order to be qualified to testify as an expert witness.'" ***Beahm v. Shortall***, 279 Md. 321, 339 (1977), quoting *Stickell v. City of Baltimore*, 252 Md. 464, 471 (1969). Appellees were merely attempting to qualify Mr. Cromwell as an expert witness in the area of standard of care for an attorney. To do so, Mr. Cromwell was properly allowed to testify as to his sundry appointments and his involvement with various law-related organizations and committees.

Appellants also argue that Mr. Cromwell "portrayed himself to the jury as a judicial appointee"; therefore, the Code for Conduct of Judicial Appointees applies to him, which states that judicial appointees "should not use the prestige of the position to advance the private interests of others" and should not "testify voluntarily as a character witness."[10] Md. Rule 1232, Canon 2. A "judicial appointee," to whom Maryland Rule 1232 applies, is defined in that rule as:

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[9] Appellants also assert that the jury should not have heard of Mr. Cromwell's past position as Chairman of the Maryland Appellate Judicial Nominating Commission, his involvement with the Maryland Code Commission, his appointment to the Commission for Law Enforcement and the Administration of Justice, and hi smemberships in the American Law Institute, the Board of Governors of the Maryland State Bar, the Committee on Professional Conduct, the Section Council on Legal Education and Admission to the Bar, the American College of Trial Lawyers, and the American College of Estate and Trust Counsel.

Appellants objected only to the testimony about Mr. Cromwell's current position as Chairman of the Attorney Grievance Commission of Maryland and his invovlement with the State Bar's Committee on Lawyers Professional Conduct and, therefore, have not preserved their right to appeal the propriety of the allowance of other portions of the witness's testimony regarding his professional qualifications.

[10] Mr. Cromwell did not, of course, testify as a character witness; he was called as an expert witness.

> a master, examiner, auditor, referee appointed by the Court of Appeals of Maryland, the Court of Special Appeals of Maryland, a circuit court or an Orphans' Court; or a commissioner appointed by the Administrative Judge of the District Court of Maryland subject to the approval of the Chief Judge of the District Court of Maryland.

Mr. Cromwell does not fall within the definition; therefore, Maryland Rule 1232 does not apply to him and his conduct cannot be judged by it.

Appellants also argue that Mr. Cromwell's testimony that he was "responsible for the 'conduct of lawyers'" and "deals with 'lawyer discipline' and ... mattress involving 'professional conduct' of lawyers ... incorrectly [allowed the jury to infer] that the Defendant did not violate the Code of Professional Conduct/Responsibility." Appellants argue that this was highly prejudicial and confusing to the jury. The short answer to the contention is that these were not the objections raised below. See Md. Rule 8-131(a); ***Thomas***, supra, 301 Md. at 328; ***Klein v. Weiss***, 284 Md. 36, 55 (1977) (holding that objections based on specific grounds, such as relevancy, limit objector to those grounds on appeal).

As already mentioned, Mr. Norris's counsel argued to me trial court that the testimony was "prejudicial given the fact that they [defendants] filed a motion in limine that those issues not even be addressed." Mr. Norris now argues that he was barred from

> even mentioning the Rules of Professional Responsibility and from arguing that Defendant's actions violated his professional ethics. Against this backdrop, however, the Defendant was permitted to have his expert testify of his special credentials relevant to professional ethics and conduct....

Appellees filed a motion in limine seeking to exclude any reference at trial to alleged ethical violations by Mr. Gimmel and his firm as irrelevant to the issue of legal malpractice. See, e.g., ***Kersten v. Van Grack, Axelson & Williamsowsy***, 92 Md. App. 466, 476 (1992) (holding that Maryland Rules of Professional Conduct are not a basis for civil liability). Judge Ferretti ruled on July 11, 1994, that the parties

could not talk about violations of the ethical rules. "If [Mr. Norris's] expert says that ... doing x, y and z violated the standard of care, then so be it.... It is the standard of care that counts, not the ethical violations...."

The ruling on the motion *in limine* clearly went to references to the appellees' conduct as violations of ethical rules, not the mere mention that an expert witness had served on an ethics committee.

Even if we were to hold that the court erred with respect to Mr. Cromwell's testimony, appellants would not benefit. In a civil case, in order to warrant reversal, an appellant must show not only error but substantial injury resulting from that error. Beahm, supra, 279 Md. at 330-31. Appellants have not shown substantial injury caused by the fact that Mr. Cromwell testified that he served on a bar association ethics committee or on the Grievance Commission. Appellants boldly assert, without supporting argument or authority, that they were prejudiced because this testimony allowed the jury to infer that Mr. Gimmel did not violate the Code of Professional Responsibility. At trial, counsel for appellees did not ask the jury to draw such an inference, and it is unlikely, in the extreme, that such an inference was drawn. It is obvious that the inference is impermissible, ***Chesapeake & Potomac Tele. Co. v. Hicks***, 75 Md. App. 503, 524 (1975), and if Mr. Norris feared it would be drawn, his counsel could have requested, but did not, an instruction to that effect.

V. Was Mr. Norris entitled to a "judgment of professional negligence" as a matter of law?

Appellants urge this Court to review the evidence presented at trial and "to find professional negligence" on the part of the appellees as a matter of law. Counsel for Mr. Norris made no motion for judgment at the end of all the evidence and did not otherwise preserved this issue for appeal. See Md. Rule 2-519)a); Fearnow v. Chesapeake & Potomac Tele. Co. of Maryland, 104 Md. App. 1, 27 (1995). Inasmuch as counsel for Mr. Norris failed to preserve this issue for appellate review, the merits of appellants' contention need not be discussed.

VI. Did the motions judge err as a matter of law by granting summary judgment against Heritage?

In oral argument, counsel for appellants conceded that, if this Court ruled against Mr. Norris on e first five issues presented Heritage was not prejudiced by the grant of summary judgment against it. Accordingly, we answer the sixth issue in the negative.

APPELLEES' MOTION TO DISMISS APPEAL DENIED;[11]
JUDGMENT AFFIRMED;
COSTS TO BE PAID BY APPELLANTS.

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[11] Appellees filed a motion to dismiss the appeal founded on their contention that the appeal was not filed within 30 days of the clerk's entry of final judgment. We have reviewed the docket entries nad have condluced that the appeal wa filed within 30 days. The verdict was returned on Jyuly 22, but the judgment was not entered in the circuit court until August 2, 1994. Appellants' motion for new trial was filed within n day sof the entry of judgment. The disposition of that motion was on September 15, 1994. Thus, the appeal filed on October 11, 1994 was timely.

Appendix B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1859

September Term, 1994

THOMAS A. NORRIS ET AL.

v.

GIMMEL, WEIMAN, SAVITZ & KRONTHAL ET AL.

Bishop,
*Alpert,
Salmon,

JJ.

Dissent Opinion by Bishop, J.

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*Alpert, J., participated in the argument and decision in this case but retired from the court prior to the filling of the opinion.

Filed: November 29, 1995

Because I am convinced that Mr. Cromwell's testimony, with respect to his judicial appointments, was highly improper and had absolutely nothing to do with his qualifications to testify with regard to the issues involved in this case, I dissent from the holding of the majority. I believe that the testimony was highly prejudicial and affected the outcome of this case. Based on the foregoing, I would reverse and remand for a new trial.